

UNITED STATES OF AMERICA  
MERIT SYSTEMS PROTECTION BOARD

JULIETA C. NOVELOSO,  
Appellant,

v.

OFFICE OF PERSONNEL MANAGEMENT,  
Agency.  
(CSA 3 056 281)

DOCKET NUMBER  
SE08318910676

DATE: MAY 29 1990

Lourdes H. Santos, Esquire, Angeles City, Philippines,  
for the appellant.

Kenneth R. Brown, Washington, D.C., for the agency.

BEFORE

Daniel R. Levinson, Chairman  
Maria L. Johnson, Vice Chairman

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued October 6, 1989, that sustained the agency's reconsideration decision denying her application for a civil service retirement annuity. For the reasons discussed below, we find that the petition does not meet the criteria for review set forth at 5 C.F.R. § 1201.115, and we therefore DENY it. We REOPEN this case on our own motion under 5 C.F.R. § 1201.117, however, AFFIRM the initial decision as MODIFIED by this Opinion and Order, and SUSTAIN the agency's reconsideration decision.

### BACKGROUND

The appellant applied for a deferred retirement annuity based on her civilian service at Clark Air Force Base in the Philippines from December 22, 1965, to January 22, 1971. The Office of Personnel Management (OPM) acknowledged that the appellant had over five years of Federal civilian service. It found, however, that, since she served her entire period of service under an indefinite appointment that was not subject to the Civil Service Retirement Act, she did not have five years of creditable civilian service as required by 5 U.S.C. § 8333(a). Initial Appeal File (A.F.), Tab 4, Subtab 2.

On appeal to the Board's regional office, the administrative judge likewise found that the appellant lacked the requisite five years of creditable civilian service. In her petition for review, the appellant concedes that she served pursuant to an indefinite appointment, but contends that her position was a permanent one subject to retirement coverage.

### ANALYSIS

Two types of Federal service are pertinent to a determination of whether an individual is entitled to a retirement annuity under the Civil Service Retirement Act (CSRA) -- "creditable service" and "covered service." *Herrera v. United States*, 849 F.2d 1416, 1417 (Fed. Cir. 1988). Almost all Federal service is creditable service. See *id.*<sup>1</sup>

<sup>1</sup> Generally speaking, creditable service includes the following: (1) Federal civilian service performed by an

Covered service is more limited in scope, referring to Federal employees who are "subject to" the CSRA, i.e., employees who must deposit part of their basic pay into the Civil Service Retirement and Disability Fund. See *In re Kaltakji*, 1 M.S.P.R. 63, 64 (1978), reconsideration denied, 1 M.S.P.R. 61 (1979). To qualify for a civil service retirement annuity, an employee must complete at least five years of creditable civilian service, and must have served at least one of her last two years of Federal service in a covered position. 5 U.S.C. § 8333(a)-(b).

In determining whether an individual's creditable service also constitutes covered service, the rule is that "[a]ll employees are covered by the retirement system except those specifically excluded by law or by regulations of the Office of Personnel Management."<sup>2</sup> FPM Supp. 831-1, subch. S2-1 (Sept. 21, 1981). Congress has authorized OPM to exclude from retirement coverage employees "whose employment is temporary

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individual meeting all of the provisions of 5 U.S.C. § 2105(a); (2) military service and service with the District of Columbia Government with certain qualifications and exceptions; (3) any service specifically listed in 5 U.S.C. §§ 8331(1) or 8332; and (4) any service made creditable by statute, such as Postal Service employment under 39 U.S.C. § 1005(b). See FPM Supp. 831-1, subch. S3-1 (Mar. 29, 1985).

<sup>2</sup> An "employee" is defined in 5 U.S.C. § 8331(1)(A)-(K). Statutory exclusions from covered service are enumerated in 5 U.S.C. § 8331(1)(i)-(xii). Regulatory exclusions from covered service are enumerated in 5 C.F.R. § 831.201. Whether retirement deductions were actually withheld is not necessarily determinative. If no deductions were withheld because of agency error, or because it was not determined until after the fact that such service should have been covered, the employment will still constitute covered service. See *Kaltakji*, 1 M.S.P.R. at 64; 5 C.F.R. § 831.303.

or intermittent." 5 U.S.C. § 8347(g). OPM has exercised this authority, *inter alia*, by excluding from retirement coverage employees serving under appointments limited to one year or less, intermittent employees, and employees serving under non-permanent, indefinite appointments. 5 C.F.R. § 831.201(a)(1)-(2), (12)-(13). The exclusions contained in section 831.201(a) do not in any way affect the credibility of an employee's service, however; they pertain only to the CSRA's covered service requirement. See *Herrera*, 849 F.2d at 1417-18; *Kaltakji*, 1 M.S.P.R. at 64.<sup>3</sup>

The appellant's personnel records clearly indicate that she was an "employee" as defined by 5 U.S.C. §§ 8331(1)(A) and 2105(a).<sup>4</sup> Since it is undisputed that she served more than five years in this civilian position, she therefore met the

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<sup>3</sup> To the extent that previous Board decisions have held that temporary or indefinite appointments do not constitute creditable service, they are hereby overruled. See, e.g., *Fontanilla v. Office of Personnel Management*, 34 M.S.P.R. 611, 613 (1987) (service under temporary interim appointment "was not creditable because it was not covered by the Civil Service Retirement Act"); *Cruz v. Office of Personnel Management*, 8 M.S.P.R. 95, 96 (1981) (appellant lacked 5 years of creditable civilian service because he served under indefinite appointment); *Vicente v. Office of Personnel Management*, 4 M.S.P.R. 546, 547 (1981) (same). We note, however, that the denial of retirement benefits was proper in each of these cases, since none of the appellants had met the covered service requirement of the CSRA.

<sup>4</sup> An individual is an employee under these provisions if she was (1) appointed in the civil service by a Federal official acting in his official capacity, (2) engaged in the performance of a Federal function under authority of law or executive act, and (3) under the supervision of a named Federal official while engaged in the performance of the duties of her position. See *Horner v. Acosta*, 803 F.2d 687, 691 (Fed. Cir. 1986).

creditable service requirement of 5 U.S.C. § 8333(a). OPM's reconsideration decision and the Board's initial decision were thus in error when they stated that the appellant failed to complete five years of creditable civilian service.

The appellant did not, however, meet the covered service requirement of section 8333(b). The appellant's personnel records specifically indicate that she was appointed to an "Indefinite (Intermittent)" position that was not subject to the CSRA. A.F., Tab 4, Subtab 6. Her appointment thus fell within the exclusions from covered service contained at 5 C.F.R. § 831.201(a)(2) and (a)(13). The appellant's records do indicate that, subsequent to her initial appointment, her schedule was changed from part-time to full-time work. Even if this change had the effect of making her employment no longer "intermittent" within the meaning of section 831.201(a)(2), nothing in the record reflects any change in the "indefinite" character of her appointment, or that she ever made contributions to the Civil Service Retirement and Disability Fund.

Although OPM's reconsideration decision and the Board's initial decision incorrectly stated that the appellant failed to meet the creditable service requirement of 5 U.S.C. § 8333(a), we conclude that OPM's denial of the appellant's application for a deferred annuity was proper, since she failed to meet the covered service requirement of 5 U.S.C. § 8333(b). See *Herrera*, 849 F.2d at 1418; *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984)

(adjudicatory error which is not prejudicial to a party's substantive rights provides no basis for reversal).

ORDER

This is the Board's final order in this appeal. See 5 C.F.R. § 1201.113(c).

NOTICE TO APPELLANT

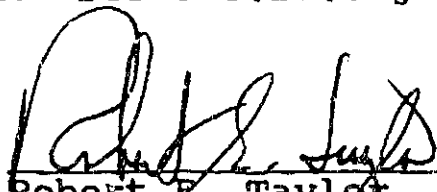
You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. See 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals  
for the Federal Circuit  
717 Madison Place, N.W.  
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. See 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

Washington, D.C.

  
Robert E. Taylor  
Clerk of the Board